

FCC MAIL SECTION

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95M-24
50741

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In Matter of) WT DOCKET NO. 94-147
)
JAMES A. KAY, JR.)
)
Licensee of one hundred sixty)
four Part 90 licenses in the)
Los Angeles, California area.)

MEMORANDUM OPINION AND ORDER

Issued: January 26, 1995 ; Released: January 30, 1995

1. On January 12, 1995, the following four pleadings seeking interlocutory relief were filed by James A. Kay, Jr. ("Kay"): Motion To Enlarge, Change Or Delete Issues; Motion For Modification Or Correction Of Order; Motion To Dismiss; and Motion To Defer Proceedings. On January 25, 1995, Kay filed a second Motion To Enlarge, Change Or Delete Issues. Also, on January 24, 1995, the Wireless Telecommunications Bureau ("Bureau") filed responsive pleadings in opposition.¹

Motion To Enlarge, Change Or Delete Issues

2. This motion was directed to the Commission. In a "Summary Of The Filing," Kay explained that he was requesting that the issues be enlarged to include certain applications that were filed by Kay, that references to licenses to which Kay is not a party be deleted, and that additional facts be alleged with respect to issues set in Paragraph 10 of the Order To Show Cause, Hearing Designation Order, And Notice Of Opportunity For hearing For Forfeiture, FCC 94-315, released December 13, 1994 (referred to as the "HDO").

3. The case was set for hearing by the Commission for hearing before an Administrative Law Judge on December 13, 1994. This case was assigned to the Presiding Judge on December 21, 1994 (FCC 94M-652). Since the date of that assignment, the Presiding Judge has the delegated authority to act on motions to enlarge, modify or delete hearing issues. 47 C.F.R. §1.243(k). But this Motion To Enlarge, Change or Delete Issues was misdirected to the Commission.² Therefore, that Motion is a nullity and it does not need to be addressed. The same Motion that is now addressed to the Presiding Judge was

¹ The Presiding Judge is able to dispose of the second Motion To Enlarge, Change Or Delete Issues that Kay filed on January 25, 1995, without a responsive pleading.

² On January 25, 1995, after the Bureau had filed its Opposition which raised the objection of a misdirected pleading, Kay delivered a copy of substantially the same pleading addressed to the Presiding Judge.

filed on January 25, 1995.³ However, the relief requested to change or modify a Commission designation order is beyond the authority delegated to the Presiding Judge. Atlantic Broadcasting Company, 5 F.C.C 2d 717, 721 (Comm'n 1966) (where reasoned analysis appears in a designation order the presiding judge must adopt that analysis and deny motions to change or modify). See also Frank H. Yemm, 39 Radio Reg. 2d (P&F) 1657 (Comm'n 1977) and Fort Collins Telecasters, 103 F.C.C. 2d 978, 983-84 (Review Bd. 1986).⁴

Motion For Modification Or Correction Of Order

4. The Presiding Judge issued Order FCC 94M-653, released December 22, 1994, wherein he set the first Prehearing Conference for January 27, 1995, and wherein he also prescribed steps for the parties to take in preparation for the Conference, including a report on stipulations, discovery and witnesses. See 47 C.F.R. §1.248 (b)(1)(c) (presiding judge may call conferences prior to hearing and may require parties to submit reports in writing regarding stipulations, discovery and the projected number of witnesses). All parties have filed Status Reports. Kay now requests that the Presiding Judge modify his Order "to reflect that the Wireless Telecommunications Bureau is not properly a party to this proceeding." The Presiding Judge's Order takes cognizance of the Commission's establishment of the Wireless telecommunications Bureau. See News Release 50909, published December 1, 1994 (FCC Establishes Wireless Telecommunications Bureau). There is no basis for Kay asking for this relief and the Order will remain as written. Kay is referred to the Atlantic Broadcasting case cited above and the Commission's prohibition against requesting Presiding Judges to reconsider their interlocutory rulings. See 47 C.F.R. §1.106(a)(1).

Motion To Dismiss

5. Kay seeks a dismissal of the HDO because the Deputy Chief of the Bureau issued an administrative Erratum to the HDO in order to reflect accurately the Wireless Telecommunications Bureau as the party in lieu of the former Private Radio Bureau, and to show that the case is docketed as a Wireless Telecommunications Bureau case. There has been no change to the substantive charges or to the sanctions sought if the charges warrant them.

³ The rules require that motions to enlarge, change or delete issues be filed within 15 days of publication of the HDO in the Federal Register. 47 C.F.R. §1.229(a)(b). Such publication was effected on January 18, 1995 (60 Fed.Reg.3642). Therefore, the Motion was filed within the required time.

⁴ Kay asks for relief in the alternative that the Bureau respond to the matters raised in the Motion as though it were a request for a bill of particulars. There is no authority cited by Kay for such relief. However, the development of evidence through discovery will be discussed at the Prehearing Conference. Ultimately, the Bureau will be required to produce its hearing evidence in advance of the hearing. In the meantime, it appears that the HDO puts Kay on notice of the Commission's charges and the sanctions contemplated that is sufficient to enable Kay to prepare a defense.

As ruled above, the Presiding Judge has no authority to grant the relief requested by Kay. Atlantic Broadcasting Company, supra. However, it is noted that Kay asserts that there was no proper Commission authorization for the establishment of the Bureau. Such an argument is rejected as absurd. The Bureau has provided a letter from the Congress dated November 1, 1994, acknowledging establishment of the Wireless Telecommunications Bureau on a date that precedes the release of the HDO. And see also News Release 50909, supra.

6. Kay also contends that the proceeding should be dismissed because the Bureau has not entered a notice of appearance. But there is no requirement for the Bureau to formally enter a notice of appearance since this is a revocation case in which the Commission has made the Bureau a party in the HDO and has assigned the Bureau its burden of proof. On the other hand, it is self evident that there is a need to know whether a licensee intends to litigate. Therefore, it is essential that a party licensee state that intention at the beginning of a proceeding. Kay filed the required notice of appearance on January 12, 1995. The Bureau's intentions are self-evident. Thus, the rule that specifically applies to this proceeding requires only that "respondents" file a notice of appearance. 47 C.F.R. §1.91(c). Kay's counsel knows the Bureau's counsel who will be appearing in the hearings on behalf of the Bureau Chief and with whom Kay's counsel has been having the discussions that are expected of opposing counsel preparing for trial. The Motion To Dismiss will be denied.

Motion To Defer Proceedings

7. Kay seeks to defer the trial of this case pending action by the Commission with respect to certain "complaints" that Kay has submitted to the Commission about the manner in which an investigation was conducted.⁵ Kay also complains about licensing issues involving Kay that are before the Commission which have not been acted upon or for which reconsideration requests are still pending. Those are matters that are not before the Presiding Judge for adjudication. Therefore, those matters have no relevance to this proceeding.

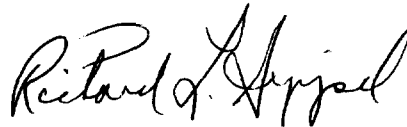
8. In addition, there is no showing of a likelihood of Kay's success with respect to those unrelated matters that are before the Commission. See test for a stay in Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Commission v. Holiday Tours, 559 F.2d 841, 843 (D.C. Cir. 1977) (substantial likelihood of success on the merits; irreparable injury to Kay if stay is denied; stay will not substantially harm the Commission; stay is in the public interest; and Kay has made a substantial case and the foregoing factors strongly favor a stay). Kay has not made a showing with respect to any of these factors. Therefore, the Motion To Defer Proceedings will be denied.

⁵ On January 13, 1995, Kay filed an Erratum to reflect that there are two and not three Commission employees who are the subject of his "complaints".

Order

Accordingly, for the foregoing reasons, IT IS ORDERED that the Motions of James A. Kay, Jr. that were filed on January 12 and 25, 1995, to Enlarge, Change Or Delete Issues; for Modification Or Correction Of Order; To Dismiss; and To Defer Proceedings, ARE EACH DENIED.⁶

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in black ink, appearing to read "Richard L. Sippel". The signature is fluid and cursive, with the first name "Richard" and last name "Sippel" clearly distinguishable.

Richard L. Sippel
Administrative Law Judge

⁶ There is also pending an Application For Review to the Commission wherein Kay seeks to have resolved a question as to whether the Bureau's Deputy Director had authorization to issue an Erratum to the HDO. In addition, Kay has filed a Request For Permission To File An Appeal from an interlocutory order of the Presiding Judge (FCC 95M-16) that will be the subject of a separate ruling by the Presiding Judge.